

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP LEE CORSER,

Defendant-Appellant.

UNPUBLISHED

June 18, 1999

No. 205377

Montcalm Circuit Court

LC No. 97-000031 FC

Before: Cavanagh, P.J., and MacKenzie and McDonald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a), for engaging in sexual penetration with the victim, who was fifteen at the time of the offense. The trial court sentenced defendant to concurrent terms of ten to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

I

Defendant first argues the trial court erred in denying his motion to discover hospital records relating to the victim's suicide attempt, which occurred after the incident. He also asserts that the denial violated his right to due process. We review the trial court's decision for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998). The trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *Id.*

Defendant sought to have an in-camera review of the records because the victim had told another witness that the charged acts never occurred and defendant believed that the records would contain other exculpatory statements made to physicians and psychologists who treated her. The parties do not dispute that information contained in the records is privileged and protected from disclosure in judicial proceedings, MCL 330.1750; MSA 14.800(750)(1). However, MCR 6.201(C)(2) requires the trial court to conduct an in-camera review of the records if a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense. There may have been a reason to believe the victim made statements to caregivers at the hospital that the rape

had not occurred because she had written a letter to a witness in the case denying the incident. However, assuming the records contained such statements, we find there was not a reasonable probability that the verdict would have been different with the records. *Fink, supra* at 459. The fact that the victim had written a letter stating that no crime had actually taken place was brought out at trial. Accordingly, there was evidence that the victim had made exculpatory statements, which was what defendant sought to discover. See *Id.* We find no error requiring reversal.

II

Defendant next argues the trial court violated his due process rights by refusing to allow him to cross-examine the investigating officer regarding allegations that the officer told defendant that charges against him would be dropped if he testified in an unrelated case against the father of a witness in this matter. We review the trial court's decision to exclude this evidence for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289-290; 531 NW2d 659 (1995).

First, we note that the trial court incorrectly categorized this alleged discussion between defendant and the investigating officer as a plea bargain. A particular discussion does not amount to a plea bargain unless (1) the "accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and (2) . . . the accused's expectation was reasonable given the totality of the objective circumstances." *People v Oliver*, 111 Mich App 734, 756; 314 NW2d 740 (1981), rev'd on other grounds *People v Williams*, 422 Mich 381; 373 NW2d 567 (1985). Defendant was not under arrest when this discussion took place and was supposedly standing just outside his home. There could be no reasonable expectation under the circumstances that this was a discussion concerning an actual plea bargain, and the evidence should not have been suppressed under MRE 410.

Assuming the trial court should have allowed defendant to cross-examine the officer regarding the alleged statements in an attempt to show bias, we find that suppression was harmless error and that there was no violation of defendant's due process rights. *People v Minor*, 213 Mich App 682; 541 NW2d 576 (1995). An error is harmless beyond a reasonable doubt when it has no effect on the verdict and is not prejudicial to the defendant. *Id.* at 685-688. There was evidence at trial that after hearing defendant was to be charged with a crime, a witness had been upset to the point of requiring medication to keep her emotionally stable through the trial and that this witness had initially insisted that the victim was a "liar." The jury also learned that this witness changed her story under pressure from family members and the victim's mother, and that the witness and the investigating officer did not get along. Although this was not the specific evidence of bias that defendant wished to present, the jury was made aware of other possible factors influencing this witness' testimony, which is ultimately what defendant was trying to accomplish. We do not find that defendant was prejudiced in any way, nor the verdict affected, by the suppression of this evidence.

III

Defendant next asserts that because defense counsel elicited highly prejudicial evidence of other uncharged criminal sexual conduct with the complainant, he was denied the effective assistance of counsel. Defendant did not move for a new trial or an evidentiary hearing on this basis in the trial court.

Accordingly, appellate review is permitted only to the extent allowed by the lower court record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). In order to establish his claim of ineffective assistance, defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Defendant must overcome a strong presumption that the challenged decisions constituted sound strategy. *People v Stewart (On Remand)*, 219 Mich App 38, 41; 555 NW2d 715 (1996). Because the evidence appeared to be aimed at impeaching the victim, by showing the implausibility of her returning to defendant's home after he had allegedly raped her there, we conclude that the line of inquiry was an objectively reasonable trial strategy. Defendant has failed to meet his burden of establishing his claim of ineffective assistance.

IV

Finally, defendant argues the trial court violated his due process rights by refusing to allow him to introduce evidence that the victim engaged in oral sex with another man at defendant's home on the night of the charged offenses. The trial court ruled the evidence was inadmissible pursuant to the rape-shield statute, MCL 750.520j(1); MSA 28.788(10)(1). The evidence defendant sought to admit clearly falls within the rape-shield statute's general exclusionary rule and does not fall under either of the statute's narrow exceptions. See *People v Adair*, 452 Mich 473, 478; 550 NW2d 505 (1996).

However, defendant relies on *People v Hackett*, 421 Mich 338; 365 NW2d 120 (1984), and argues the evidence was admissible because he wanted to use it to show the victim had an ulterior motive for making a false charge. In *Hackett*, *supra* at 348, the Court stated that "in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge," and this evidence would be admissible to preserve the defendant's right to confrontation. However, there must be a sufficient showing that the evidence is relevant to this purpose and is not being used as evidence of the complainant's character or for impeachment. *Id.* at 350. Moreover, the trial court may still exclude the evidence if it determines that its probative value is "substantially outweighed by the risks of unfair prejudice, confusion of issues, or misleading the jury." *Id.* at 351.

Defendant's argument that the victim was attempting "to make it good because she's embarrassed" was unconvincing. We fail to see how the proffered evidence showed the victim had an ulterior motive to make a false charge against defendant. We also question defendant's true motive for seeking introduction of such evidence, in light of defense counsel's remark that the victim had presented herself as "Little Bo Peep" and that there were witnesses who would state otherwise. This indicates that defendant was attempting to introduce the evidence for the improper purposes of generally impeaching the victim and placing her character into question. The trial court's exclusion of the evidence was not an abuse of discretion. *People v Starr*, 457 Mich 490, 491, 494; 577 NW2d 673 (1998).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Barbara B. MacKenzie
/s/ Gary R. McDonald